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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

IN RE

ZARKO SEKEREZ,

Attorney-Petitioner.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause of the Fourteenth Admendment requires that disbarment of an attorney be grounded upon a standard of proof insuring greater factual certainty than that yielded by a "preponderance of the evidence."

2. Whether the Indiana Supreme Court violated due process when it applied a procedural rule, governing an attorney's access to that court's review of a hearing officer's findings of fact, in such a way as to ignore: (1) the fact that the rule itself contained internal inconsistencies resulting in vagueness; and (2) the fact that the court's previous interpretation of the rule provided no warning of the ruling it ultimately made, when it was too late for petitioner to conform.



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IN THE
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IN RE

ZARKO SEKEREZ,

Attorney-Petitioner.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

Attorney-petitioner, ZARKO SEKEREZ
("petitioner"), respectfully requests that
a writ of certiorari issue to review the
judgment and opinion of the Supreme Court
of Indiana entered January 18, 1984, by
which that court disbarred petitioner from
practicing law in the State of Indiana.



OPINION BELOW

A hearing officer appointed by the Indiana Supreme Court heard evidence as to a seven-count Complaint for Disciplinary Action and filed a Report, finding against petitioner on all seven counts and deeming him to be in violation of eleven provisions of the Indiana Disciplinary Rules. (Appendix B) The Indiana Supreme Court dismissed two of the counts but, finding against petitioner under the remaining five, disbarred him from the practice of law in Indiana. (Appendix A, ____ Ind. ____, 458 N.E.2d 229 (1984)).*

*The Indiana Supreme Court's order, entitled "Disciplinary Action," will be referred to herein as the "Disbarment Order."

JURISDICTION

The Disbarment Order of the Indiana Supreme Court was entered January 18, 1984. A timely-filed Petition for Rehearing was denied on April 23, 1984. This Petition for Writ of Certiorari was filed within ninety days of the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES:

Section 1.

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE RULE INVOLVED

Indiana Rule For Admission and
Discipline of Attorneys 23, Section
15(c) (in pertinent part):

In the event a party does not concur in a factual finding made by the hearing officer and asserts error in such finding in the petition for review, such party shall file with the petition for review a record of all the evidence before the hearing officer relating to this factual issue. Within thirty (30) days of the filing of the transcript, opposing parties may file such additional transcript as deemed necessary to resolve the factual issue so raised in the petition for review....

STATEMENT OF THE CASE

Introduction

Petitioner was disbarred in Indiana on the basis of facts established by a mere preponderance of the evidence--a standard that petitioner contends is constitutionally insufficient to support

the serious economic loss as well as damage to reputation inflicted by disbarment. The application of this inadequate standard of proof was the result of the Indiana Supreme Court's harsh and unpredictable interpretation of a procedural rule. This interpretation itself violated due process because it did not give petitioner sufficiently clear notice of how he could avoid being held to have waived his right to have the Indiana Supreme Court exercise its function as the "ultimate fact finder"* in an attorney disciplinary action in which it "sits as a trial court and must determine issues of fact."**

*Matter of Moore, 453 N.E.2d 971, 973 (Ind. 1983).

**Matter of Murray, 266 Ind. 221, 362 N.E.2d 128, 130 (1977).

Lack of an Independent State Ground for
the Indiana Supreme Court's Disbarment of
Petitioner.

In its Disbarment Order, the Indiana
Supreme Court stated:

Having determined that the
Respondent has engaged in misconduct
we must evaluate the appropriate
sanction. Taken individually, the
violations may not appear to be of a
magnitude which would indicate a
severe sanction. However, when
examined as a whole, the numerous
violations suggest that Respondent's
entire system of clinics was operated
in an unprofessional manner...
(Disbarment Order, p. 27, Appendix A.)

Thus, by the Court's own admission, the
disbarment rests not upon any single
finding of misconduct or even upon
several such findings but, rather, upon
all the findings of a hearing
officer--adopted without review--which
supported the five counts the Indiana
Supreme Court retained. The weight of
the evidence, the standard of proof, and

petitioner's right to the court's review are therefore inescapable issues.*

Background

Petitioner had been practicing as a traditional law firm in Indiana since 1965 when, as a result of this Court's

*Count VI concerned petitioner's use and advertisement of what the court concluded were trade names prohibited by the Indiana Code of Professional Responsibility for Attorneys at Law. Since the evidence supporting this count was purely documentary, this count can be said to involve no issues of fact. However, all the remaining counts contributing to petitioner's disbarment were based upon factual testimony and required not only that determinations be made as to what actually happened but also that such determinations be weighed against the frequently general wording of the disciplinary rule in question. (E.g., "Conduct...prejudicial to the administration of justice;" "Conduct that adversely reflects on...fitness to practice law;" "...reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice...;" "Intentional failure to seek the lawful objectives of his client through reasonably available means...")

decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), he opened branch offices--or "legal clinics"--in a number of cities within the state. Petitioner hoped that by concentration on routine legal services and by efficient use of staff supervised by a licensed attorney in each office, he could provide services at modest rates.

Attorneys in petitioner's clinic handled a high volume of legal matters, and gave large numbers of initial free consultations, frequently advising that the services of a lawyer were not needed and instructing on pro se procedures. Petitioner's clinics received referrals from a roster of diverse sources.*

*E.g., the Better Business Bureau, credit and labor unions, courts, hospitals, Valparaiso University.

However, in August, 1980, the Disciplinary Commission of the Supreme Court of Indiana ("Commission") filed a seven-count complaint against Mr. Sekerez. Five counts were based on grievances of individuals; two were based on misconduct alleged by the Commission itself.

After a five-day evidentiary hearing in August, 1981, involving a number of witnesses produced by both petitioner and the Commission, the hearing officer adopted--verbatim--the findings and conclusions submitted by the Commission for each of the seven counts.

In July, 1982, petitioner petitioned the Indiana Supreme Court for a review of the hearing officer's Report. Petitioner challenged certain of the findings of fact and asserted the constitutional

inadequacy of the preponderance of the evidence standard under which the hearing officer had made his findings.*

STATEMENT OF THE CASE PERTAINING TO
ARGUMENT I

In its order of January 18, 1984, the Indiana Supreme Court perfunctorily dismissed petitioner's due process objection to the preponderance of the evidence standard and, in spite of its declared intent to review the evidence under the "clear and convincing" standard, recently declared by that same court to be appropriate in disbarment proceedings, ultimately refused to review any of the hearing officer's factual determinations.

*As provided by Indiana Admission and Discipline Rule 23, Sec. 14(f).

The Court dismissed two of the counts, but disbarred petitioner on the basis of the cumulative effect of the surviving five counts. In so doing, the Court deprived petitioner of the license to practice his profession on the basis of the minimum standard of factual reliability. (Disbarment Order, Appendix A.)

Petitioner's Raising in the Indiana Supreme Court of His Fourteenth Amendment Due Process Claim that a Mere Preponderance of the Evidence is a Standard of Proof Insufficient to Support Disbarment.

In his Brief of Respondent, filed July 19, 1982, petitioner argued that:

Admission and Discipline Rule 23, Section 14(f), which provides for the standard of proof to be used in disciplinary proceedings, is in violation of the due process Clause of the Fourteenth Amendment to the United States Constitution, in that it allows the imposition of disciplinary sanctions upon attorneys without a showing of clear and

convincing proof. (Brief of Respondent, p. 9)

Subsequently, in his Reply Brief, petitioner stated:

...[T]he standard of proof issue is important. Disciplinary proceedings may have a profound impact upon the respondent-attorney, both in terms of his reputation and his ability to continue to practice in his chosen profession. Although it is a privilege to be allowed by the State of Indiana to practice law, once this privilege is granted, the attorney acquires a property right, which can only constitutionally be altered by due process of law. Given the interests of the respondent-attorney at stake, and the quasi-criminal nature of disciplinary proceedings, the higher standard of proof of "clear and convincing evidence" is constitutionally required.

The United States Supreme Court has held that the "clear and convincing" standard should be adhered to in quasi-criminal cases, which "are significantly different from the ordinary economic case: where significant individual rights are not at stake." In re Winship, (1970) 397 U.S. 358, 371...[Citations to Indiana civil cases applying the clear and convincing standard of proof omitted.] The logic and

rationale of the above-cited cases leads to the conclusion that clear and convincing proof should be required in attorney disciplinary proceedings...(Reply Brief of Respondent, filed February 18, 1983, pp. 54-55).

Choosing to ignore the expanded due process argument in his Reply Brief, the Indiana Supreme Court stated that petitioner made no attempt to substantiate his due process claim regarding the standard of proof. Nevertheless, the court, citing its own recent case, Matter of Moore, 453 N.E.2d 971 (1983), stated:

[T]he 'clear and convincing' standard of proof more reasonably conforms to our analysis of the nature of the disciplinary process and follows the weight of authority. Accordingly, we will review the evidence in this case under a 'clear and convincing' standard. (Disbarment Order, p. 7, Appendix A.)

However, the Court ultimately denied such a review by adopting and accepting

as its own the findings of fact submitted by the hearing officer, findings made under a mere preponderance of evidence standard. (Ibid.)

In his Brief In Support Of Petition For Rehearing, petitioner again argued the inadequacy of the hearing officer's standard of proof:

In light of this Court's recent decision in In re Moore, (1983) 453 N.E.2d 971, wherein the Court held the "clear and convincing" standard of proof applicable to disciplinary actions, the challenged findings of the hearing officer in this cause must be critically examined, since he made his findings and conclusions using the "preponderance of evidence" standard of proof... (Brief in Support of Respondent's Petition For Rehearing, p. 11.)

The Indiana Supreme Court summarily denied petitioner's Petition For Rehearing. (Order, April 23, 1984, Appendix D.)

STATEMENT OF THE CASE PERTAINING TO
ARGUMENT II

In addition to arguing the insufficiency of the standard of proof supporting the hearing officer's factfindings, petitioner challenged a number of specific findings.* He did so pursuant to the directive of Admission and Discipline Rule 23, Section 15(c) which states in pertinent part:

In the event a party does not concur in a factual finding made by the hearing officer and asserts error in such finding in the petition for review, such party shall file with the petition for review a record of all the evidence before the hearing officer relating to this factual issue. Within thirty (30) days of the filing of the transcript, opposing parties may file such additional transcript as deemed necessary to resolve the factual issue so raised in the petition for review.

*See Appendix F.

After requesting an extension of time from the Court in order to submit even a limited record with his Petition for Review, on July 19, 1982, petitioner provided a partial record consisting of his own testimony (both on direct and cross examination), testimony of employees and of attorneys familiar with him, and various documents, including a letter from a client supporting petitioner's claim in regard to an important factual issue of Count V.*

Subsequent to petitioner's submission of the evidence, the Commission

*Mrs. Hatcher's letter acknowledged that well before he accepted the case, petitioner had indeed talked to Mr. Hatcher about the auto accident in question. The letter thus seriously challenges the hearing officer's finding that petitioner had not provided the initial free consultation which he advertised.

petitioned the court to require petitioner to supplement the record submitted under Rule 23, Section 15(c). By Order of October 25, 1982, the court ruled that:

that portion of the (Commission's) petition seeking to require the supplementation of the record should not be granted in that the findings of the hearing officer are a sufficient basis for the implementation of discipline and that it is incumbent on the petitioning party to present a sufficient record to countermand the significance of the hearing officer's findings. If the record submitted is insufficient, the petitioning party must stand on it... (Order, October 26, 1982; Appendix C.)

With his Reply Brief, filed February 18, 1983, petitioner included the transcript of testimony, on direct examination by the Commission of his client, Susan McCoy, who filed the grievance set forth in Count III. This testimony brought into question an

important factual finding* and, when combined with documents also submitted at this time, cast serious doubt on the client's veracity as a foundation for the misconduct of Count III as a whole.**

In its Disbarment Order, the Indiana Supreme Court stated that petitioner "filed only a transcript of the testimony of his witnesses," an assertion that not only overlooks the McCoy testimony but

*The finding being that petitioner had not provided the free initial consultation advertised.

**A check drawn by Mrs. McCoy and verified by the drawee bank proved that she had made contact with petitioner's office almost two months before she said she had on direct examination. Her lack of reliability is relevant not only to the free consultation issue but casts serious doubt on her allegation that petitioner had advised her to promise to pay her husband's attorney's fees but then return to California and never pay them.

that seems to imply that all the evidence petitioner submitted in his factual challenges was either produced by him or by persons in his camp, an implication belied by the McCoy and Hatcher documents as well as others. However, using this pronouncement as its justification, the Court, quoting only from the first sentence of Rule 23, Section 15(c), stated:

... Admission and Discipline Rule 23, Section 15, defines the procedure for review by this Court of our Hearing Officer's findings. This provision authorizes a petition for review and requires a party who challenges the factual findings to submit with his petition a record of all of the evidence relating to the challenged factual issue (our emphasis). Upon examination of the pleadings filed by Respondent, it appears to this Court that the Respondent has chosen not to follow this procedure...

...

This Court finds that a transcript containing only one party's case in chief does not constitute all of the evidence as required under the above noted rule.

...

... As previously held, the transcript submitted by the Respondent did not comply with our rule. Therefore, in that the Respondent has not provided the requisite record to assert error and in that the Disciplinary Commission has not submitted any record, this Court now adopts and accepts as its own the findings of fact submitted by the hearing officer and will only review the conclusions thereunder and the Respondent's constitutional challenges.

(Disbarment Order, pp. 1, 3, 5, Appendix A.)

Thus, the court foreclosed review of the challenged findings, as well as of the findings as a whole, on the basis of a mis-characterization of the evidence petitioner submitted in support of his challenges and a consequently harsh and surprising interpretation of Rule 23,

Section 15(c), which overlooked the ambiguities created by the second sentence of the Rule and the more liberal interpretation contained in its own Order of October 26, 1982. It is noteworthy that regarding the severity of its sanctions, the Court stated:

Having determined that the Respondent has engaged in misconduct we must evaluate the appropriate sanction. Taken individually, the violations may not appear to be of a magnitude which would indicate a severe sanction. However, when examined as a whole, the numerous violations suggest that Respondent's entire system of clinics was operated in an unprofessional manner. ... (Disbarment Order, p. 27, Appendix A).

It is no more possible to guess what resolution the Court would have made of those facts challenged under Rule 23, Section 15(c), than it is to speculate what the hearing officer's findings might

have been under a proper standard of proof.

Petitioner's Timely Raising Of His Claim That The Court's Harsh And Unpredictable Application of Admission and Discipline Rule 23, Section 15(c) Violated Due Process.

Petitioner first raised his due process objection to the Indiana Supreme Court's refusal to consider his challenges in his Brief in Support Of Respondent's Petition For Rehearing, in which he asserted, pp. 8-9:

...The rules do not require that the entire record be submitted, unless all findings are challenged. Fundamental fairness therefore dictates that Respondent's evidence be considered and reviewed. The Commission should not be rewarded for its inaction, and neither should Respondent be penalized therefor.

Petitioner's objection to the Court's refusal to review the challenged facts was timely because, the Court's application of Rule 23 was unexpected and

unpredictable:

A. The first sentence of Rule 23, Section 15(c), does state that a party asserting error in a hearing officer's factfinding:

shall file with the petition for review a record of all the evidence before the hearing officer relating to this factual issue.

However, the next sentence of the Rule belies its literal meaning:

Within thirty (30) days of the filing of the transcript, opposing parties may file such additional transcript as deemed necessary to resolve the factual issue so raised in the petition for review.

Clearly, the second sentence makes it plain that a petitioner is to supply what he believes to be all the necessary evidence and that there is a resultant burden upon the defender of the challenged finding to file any additional evidence he deems essential to resolution of the

dispute.

B. The Indiana Supreme Court's Order of October 25, 1982, added to the unpredictability of the Court's applying the Rule as it eventually did when, instead of saying it is the duty of the party petitioning for review of the hearing officer's findings to submit all possible evidence regarding those findings, it stated:

...it is incumbent on the petitioning party to present a sufficient record to countermand the significance of the hearing officer's findings...
(Emphasis added; see Appendix C.)

The Court's interpretation of its rule was not lost upon petitioner:

...Although opposing counsel has criticized the limited Record submitted to this Court by Respondent, Respondent has, in the words of this Court's ruling, on October 25, 1982, presented "a sufficient record to countermand the significance of the Hearing Officer's findings" in which he cannot acquiesce. (Reply Brief, pp. 1, 2.)

Nevertheless, petitioner included more evidentiary material with his Reply Brief. (See Statement of the Case, supra.) The Commission submitted nothing in support of the findings.

Having thus invited reliance upon a sensible interpretation of a rule that itself contains internal conflicts, the Indiana Supreme Court proceeded unpredictably to foreclose petitioner from making any factual challenges whatsoever. In doing so, the court ignored both the Rule's ambiguity and the import of its own previous Order on the subject. (See Disbarment Order, pp. 2-3, 7, Appendix A.)

On February 27, 1984, petitioner filed with the court a Motion For Leave To Supplement Record, stating that he had "in good faith attempted to comply with

all applicable rules and present this Court with what [he] believed to be an adequate record of evidence relating to the challenged findings..." This Motion was denied, along with his Petition for Rehearing. (Order, April 23, 1984, Appendix D.)

The instant case falls into the class of decisions in which this Court reviews a State Supreme Court's unpredictable foreclosure either of a party's opportunity to litigate a substantive federal issue (see, Missouri v. Gehner, 281 U.S. 313 (1930), in which an unpredictable construction of a state tax statute resulted in the taxation of U.S. Government bonds without the holder's chance to invoke federal protection against such taxation), or of a party's general due process right to be heard

regarding the matter at issue (see, Saunders v. Shaw, 244 U.S. 317 (1917), in which the Missouri Supreme Court's unanticipated ruling resulted in the admission of evidence which had been excluded at trial and which therefore had not been rebutted by the opposing party; and Brinkerhoff - Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930), in which the overruling of a clear precedent upon which the trust company relied left the company without any means of challenging a tax levy).

Petitioner's assertion of his federal claim regarding the application of Rule 23 in his Petition for Rehearing was timely, since "it was raised at the first opportunity." Brinkerhoff-Faris, supra, 281 U.S. at 678. The Indiana Supreme Court's unforeseeable application of its

rule brings this case within this protective principle as amplified in Missouri v. Gehner, supra, 281 U.S. at 320:

It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the State court for rehearing where the petition is denied without more. ...But here the company at the first opportunity invoked the protection of the federal Constitution and statute. It could not earlier have assailed the [State statute] as violative of the Constitution and laws of the United States... It may not reasonably be held that the company was bound to anticipate [the Missouri Supreme Court's] construction or in advance to invoke federal protection... 281 U.S. at 320. (Citations omitted.)

And, in Saunders v. Shaw, supra, 244 U.S. at 320, Justice Holmes wrote:

...But when the act complained of is the act of the [State] Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add

to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance...

The Indiana Supreme Court's October, 1982, Order actually reconciled the first two sentences of Rule 23, Section 15(c). Therefore, the Court's reinterpretation of the rule in its Disbarment Decision constitutes not only an abrupt change of stance but also makes the rule's second sentence meaningless. The twelfth-hour foreclosure of review at the same time defines petitioner's raising of the issue as procedurally timely and frames the substantive due process deprivation.

ARGUMENT

I.

"PREPONDERANCE OF THE EVIDENCE" IS A CONSTITUTIONALLY INSUFFICIENT STANDARD UPON WHICH TO BASE FACTUAL FINDINGS SUPPORTING THE DISBARMENT OF AN ATTORNEY.

The gravity of the interests derived from a law license has been recognized by this Court in several contexts.

Even before admission to the bar, a potential attorney's interests are considerable. Preparatory to ruling on the constitutionality of the California Supreme Court's denial of a law license, Justice Black stated, in Konigsberg v. State Bar of California, 353 U.S. 252, 257-58 (1957):

While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer.

Certainly, upon earning the privilege to practice law, "an attorney's calling or profession is his property, within the true sense and meaning of the Constitution." Ex Parte Wall, 107 U.S. 265, 289 (1883). And disbarment, the deprivation of a lawyer's license," is a punishment or penalty imposed on the lawyer" by way of "adversary proceedings of a quasi-criminal nature." In re Ruffalo, 390 U.S. 544, 550, 551 (1968). Thus, it is clear that the label "civil" does not necessarily obviate the need for stricter safeguards than those that pertain to the trial of purely civil matters. In re Winship, 397 U.S. 358, 365-66 (1970). The characterizations in Konigsberg and Ruffalo of an attorney's interest in his license, and of the nature of the proceedings depriving him

of it, suggest that standards more exacting than those governing ordinary civil cases must be applied to disbarment hearings. Spevack v. Klein, 385 U.S. 511 (1967), in its discussion and treatment of disbarment as a penalty, implies that an attorney facing disbarment proceedings must be afforded considerable protection, including a higher standard of proof than that required in the ordinary civil case.

In reversing New York's disbarment of an attorney because of his refusal both to produce records pursuant to a subpoena duces tecum and to testify at a judicial proceeding, the Spevack majority, speaking through Justice Douglas, stated:

"The Fourteenth Amendment secures against state invasion... the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty... for such

silence." [Quoting from Malloy v. Hogan] 378 U.S., at 8...

In this context "penalty" is not restricted to fine or imprisonment. It means... the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly."...

...

The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him..."...

385 U.S. at 514-16.

The acknowledged drastic effects of disbarment, and the recognition that it is more than a merely civil matter, call for a due process requirement that the factual foundation for disbarment be laid upon a more firm underpinning than that provided by proof by a mere preponderance

of the evidence.

This Court appears to have established two approaches to ascertaining minimum permissible due process which are helpful in considering the problem at hand--one general, and one specifically concerning minimum standards of proof. Petitioner contends that under either approach, a preponderance of evidence is constitutionally deficient in disbarment proceedings.

1. Identifying The Dictates Of Due Process By Consideration Of Three Distinct Factors.

In Mathews v. Eldridge, 424 U.S. 319 (1976), the issue was the constitutionality of terminating Social Security disability benefits before the recipient was afforded an evidentiary hearing. Writing for the majority, Justice Powell first stated the broad

principle that: "Due Process is flexible and calls for such procedural protections as a particular situation demands." He then elaborated this principle by saying: "[R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected." Justice Powell finally focused the balancing of these interests on an analysis of "three distinct factors":

First, the private interest affected by official action; second, the risk of erroneous deprivation of such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; finally, the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

Mathews, supra, 424 U.S. at 334-335.

A balancing of the private and governmental interests in a disbarment case leaves no doubt that a preponderance of the evidence does not afford sufficient reliability.

A. The private interest affected by disbarment, loss of livelihood earned at great sacrifice of money, effort and time, as well as grave damage to reputation, is indisputably great.

B. The reliability of facts established by only a preponderance of the evidence standard reflects society's conclusion that the litigants should "share the risk of error in roughly equal fashion." Addington v. Texas, 441 U.S. 418, 423 (1979), and that it is "no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous

verdict in plaintiff's favor." In re Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). There can be no doubt that in a disbarment proceeding which, like the instant case, is based in part on facts propounded by parties filing grievances and contested by the attorney, application of a firmer standard of proof could decisively change the outcome.* It is, of course, unnecessary to speculate upon whether it would have done so in petitioner's case. See Santosky v. Kramer, 455 U.S. 745, 770 (1982).

*Cf. Mathews, in which, because the evidence upon which termination of disability benefits was, for the most part, easily documented medical assessments of the recipient's physical or mental condition, an evidentiary hearing--with its opportunity to raise questions of truth and veracity--would not have changed the result. 424 U.S. at 344-45.

C. The State's interest in disbarment proceedings, as defined in Mathews, provides no impetus for favoring a preponderance of the evidence standard over one providing more factual accuracy: A higher standard of proof will not change the nature of the proceedings, add to their expense, or reallocate limited fiscal or administrative resources. (See Mathews, 424 U.S. at 347-48.) On the contrary, the factfinder will simply apply the more demanding standard of proof to the same deliberations he must perform. To argue that the other State interest--that of protecting the public against incompetent or unethical attorneys--militates for a low grade of factual accuracy in disbarment hearings would be inconsistent with basic constitutional principles.

Surely the State's stake in ensuring the satisfactory conduct of its lawyers is no greater than is its role in protecting its people against criminal injury. Yet, in criminal proceedings "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."

Addington v. Texas, supra, 441 U.S. at 423. As this Court has recognized, the interests of an attorney in his reputation and livelihood are themselves of great magnitude. In itself, then, the State's desire to maintain a healthy bar does not justify even courting, much less embracing, a minimal standard of proof

supporting disbarment.*

Application of the Mathews analysis to the instant case compels the recognition that due process requires a greater degree of factual proof than that assured by the minimum standard of preponderance of the evidence. Those

*The fact that the State's interest in the integrity of its bar is of a sort not discussed in Mathews suggests that in those instances in which a government exercises a police power in a way that affects such basic interests as a person's freedom, liberty to engage in his occupation (or in his vested property interest in his profession), or his liberty to enjoy his good name and reputation, the focus of the due process inquiry should no longer even include the Mathews concern with financial and administrative burdens imposed on the State by greater procedural safeguards. However, Santosky v. Kramer, 455 U.S. 745 (1982), dealing with the standard of proof required in hearings affecting the fundamental liberty interest of parents in their natural children, honors, in passing, Mathew's purely practical measurement of governmental interests. 455 U.S. at 767.

cases dealing specifically with the constitutional sufficiency of various standards of factual security confirm this general conclusion.

2. The Degree Of Factual Security Due Process Requires Is A Reflection Of Society's Assessment Of The Particular Interest At Stake.

The function of a standard of proof, as that concept is embodied in the due process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Addington v. Texas, 441 U.S. 418, 423 (1979), quoting In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

In Santosky v. Kramer, 455 U.S. 745, 755 (1982), this approach is elaborated as follows:

Addington teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed

between the litigants.

Pursuing Addington's and Santosky's evaluation of differing standards of proof required by due process, it is clear that while disbarment is not a proceeding which may result in incarceration or loss of life and therefore does not require a standard of proof "designed to exclude as nearly as possible the likelihood of an erroneous judgment," it is a proceeding in which society has more than the "minimal concern with the outcome" which it has in civil disputes between private parties over money damages. Santosky, 455 U.S. at 755. Konigsberg, Ruffalo and Spevack all indicate that a State's deprivation of an attorney's means of livelihood, with its attendant devastation of reputation, concerns interests which, in

the words of Addington and Santosky, are "both 'particularly important' and 'more substantial than mere loss of money'" and that disbarment proceedings threaten him with a "significant deprivation of liberty"* as well as subject him to a risk of grave "stigma."** Santosky, 455 U.S. at 756. Thus, disbarment requires more factual security than that guaranteed

*"Without doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes... the right of an individual...to engage in any of the common occupations of life..." Board of Regents v. Roth, 408 U.S. 564, 572 (1972), quoting Meyer v. Nebraska, 262 U.S. 390, 399. Certainly, after an attorney has earned his license, he has gained--in the terms of "liberty"--the right to practice law.

**An action by a State which only affects a person's reputation activates the due process protection of liberty. See Wisconsin v. Constantineau, 400 U.S. 433 (1971). Petitioner, of course, has lost the practice of his profession as well.

by the minimal one of preponderance of the evidence.

The foregoing reasoning demonstrates that proceedings affecting the interests at stake in the present case properly fall into that category of cases for which this Court "has mandated an intermediate standard of proof--'clear and convincing evidence.'" Santosky, 455 U.S. at 756. The kinds of cases requiring this standard of proof have been a "variety of government-initiated proceedings" such as civil commitment (Addington v. Texas, 441 U.S. 418 (1979)); deportation (Woodby v. INS, 385 U.S. 276 (1966)); denaturalization (Chaunt v. United States, 364 U.S. 350 (1960)); and the termination of parental rights in natural children. (Santosky v. Kramer, 455 U.S. 745 (1982)). The fact

that the initiation of attorney disciplinary proceedings may sometimes be thought of as done under the aegis of a self-regulating bar* does not put disbarment beyond the pale of these cases. Disbarment itself is meted out by the State's highest court, by which time the matter has clearly lost any vestiges of a merely civil dispute between private parties but, instead, has become a vehicle for a State-imposed sanction of a punitive nature.

The overwhelming majority of states recognize that the disbarment of an attorney must be based on proof more

*In Indiana, the seven members of the "Disciplinary Commission of the Supreme Court of Indiana"--two of whom need not be members of the state bar--are appointed by the Indiana Supreme Court itself. Admission and Discipline Rule 23, Section 6.

reliable than mere preponderance of the evidence. Eighteen states require "clear and convincing" or greater proof and eighteen states set similar, though somewhat differently phrased, standards demanding substantially more factual security than a mere preponderance. Only twelve states are satisfied with the preponderance of the evidence standard which came to be the foundation of petitioner's disbarment.* The Indiana Supreme Court itself in Matter of Moore, 453 N.E.2d 971 (1983), while concluding that the United States Constitution does not require it, stated:

This intermediate standard of proof, "clear and convincing", more reasonably conforms to this Court's analysis of the nature of the disciplinary process and follows the

*(See attached table, Appendix E.)

weight of authority. See, Matter of Palmer, (1979) 296 N.C. 638, 252 S.E.2d 784 and cases cited therein. 453 N.E.2d at 973.

In reviewing the hearing officer's finding of facts in the present case, the Indiana Supreme Court stated that it would apply the "clear and convincing" standard but then, by a rather harsh procedural sleight-of-hand (which is the subject of Argument II, infra), proceeded to "adopt and accept as its own the findings of fact submitted by the hearing officer." (Disbarment Opinion, p. 7 Appendix A.)

Petitioner submits that the relevant cases and weight of prevailing practice demonstrate that findings of fact supporting the drastic losses incurred by disbarment demand a higher standard of factual proof than that upon which his disbarment was based.

II.

THE INDIANA SUPREME COURT'S APPLICATION OF RULE 23, SECTION 15(C), DEPRIVED PETITIONER OF HIS OPPORTUNITY UNDER THE RULE TO GAIN THE COURT'S REVIEW BECAUSE NEITHER THE RULE ITSELF NOR THE COURT'S INTERPRETATION OF IT SUFFICIENTLY APPRISED PETITIONER THAT ONLY THE RULE'S FIRST SENTENCE WOULD BE HELD OPERABLE. THIS VAGUE STANDARD OF OBEDIENCE VIOLATED DUE PROCESS.

It is, of course, settled that this Court will adopt the construction of a State's statute (or procedural rule, as here) by its own court. But a question may yet remain as to whether the statute so construed violates federal constitutional rights. Orr v. Gilman, 183 U.S. 278, 283 (1902).

Brinkerhoff-Faris Trust & Savings v. Hill, 281 U.S. 673 (1930) (in which the Missouri Supreme Court overruled a previous decision denying the existence of an administrative tax remedy and held

that it was too late for the plaintiff to pursue the newly-recognized administrative relief) stands for the general proposition that a court's change of ruling on procedure governing pursuit of a litigant's claims, after the opportunity to comply with the new interpretation has passed, is a deprivation of due process. In Brinkerhoff the administrative avenue to relief had been unequivocally closed off to the plaintiff by the Missouri Court's previous decision. In the instant case, differing interpretations of Rule 23, Section 15(c), are possible. Brinkerhoff is applicable because due process requires reasonable certainty in the description of standards exacting civil as well as criminal obedience.

In Small Co. v. American Sugar

Refining Co., 267 U.S. 233 (1925), a seller of refined sugar sued for the buyer's breach of two contracts of sale. In its answer, the buyer set up two defenses based on the Lever Act's proscription against the exaction for such a product of "more than a reasonable profit" and against contracts for delivery at a future date which "tended to increase the price of sugar and to promote the hoarding thereof." Plaintiff, citing criminal cases brought under the Lever Act, successfully demurred to these defenses on the ground that the asserted provisions of the Act conflicted with the Fifth Amendment's requirement of clear warning in the establishment of forbidden conduct. The Court dismissed the defendant's argument that the "void-for-vagueness" doctrine

applied in the criminal prosecutions was inapplicable to the civil suit at hand, and stated:

The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. 267 U.S. at 239. (Emphasis added.)*

Zellerbach Paper Co. v. Helvering, 293

U.S. 173 (1934), while not cast in

*And see Giaccio v. State of Pa., 382 U.S. 399 (1966), in which this Court held unconstitutionally vague a Pennsylvania Act (and the court's explanation of it) providing for the assessment of prosecution costs against defendants acquitted of misdemeanors. In so doing, the Court rejected the Pennsylvania Supreme Court's ruling that because the Act was not a penal statute but merely one for the collection of costs of a "civil character" the void-for-vagueness doctrine did not apply. 382 U.S. at 402.

explicit due process terms, contains an important similarity to the instant case and states a principle which, in extreme situations, like disbarment without fair opportunity for the attorney to complete the litigation of his defense, transcends being a mere rule of statutory construction and becomes a standard for measuring due process. Zellerbach concerned a controversy over the date when the statute of limitations began to run against the levying of deficiency assessments by the Commissioner of Internal Revenue. Controlling the result was the question of whether the Revenue Act of 1921 required taxpayers to file a return, in addition to one properly filed under the Act of 1918, in those cases in which there would be no increase in tax obligation under the 1921 Act. For

almost seven years before assessing large tax deficiencies, the Bureau of Internal Revenue told petitioner nothing about an obligation to file an additional tax form. Furthermore, 1922 Treasury Decisions, by instructing taxpayers who had filed returns under the 1918 Act and who were subject to additional tax under the 1921 Act to file supplemental returns covering such additional tax, implied that additional returns were not required of taxpayers whose taxes were not increased by the new law. In reversing the ruling of the Board of Tax Appeals that the four-year statute of limitations had never started to run because petitioner's return filed under the 1918 Act, was a nullity, Justice Cardozo stated:

...A statute would have to be very plain to justify a holding in such

circumstances that there was an obligation to report anew. Certainly the average man would be slow to suspect that he was subject to such a duty. If he had looked into the Treasury Decisions, he would learn that the Commissioner agreed with him... A statute of uncertain meaning will not readily be made an instrument for so much of hardship and confusion. 293 U.S. at 178.

As in Zellerbach, the conduct-setting language of Rule 23 was not only problematical itself, but its executing authority, the Indiana Supreme Court, interpreted that language in a way which invited the conduct which it later held to be insufficient. The court's surprising renunciation of its flexible standard in favor of an absolute one to which petitioner could no longer conform surely made the Rule "an instrument for.. much of hardship and confusion."

Here--unlike Small and Zellerbach--the hardship concerns not just monetary loss

but petitioner's loss of his law license and damage to his good reputation. In such a case, a state court's harsh and unpredictable interpretation of language normally within its exclusive domain should not be immune from the due process requirements of the Fourteenth Amendment. Petitioner submits that due process mandates more clarity in the description of requirements when failure to comply with those requirements results in deprivation of the opportunity to have the Indiana Supreme Court exercise its avowed function as the "ultimate fact finder."*

CONCLUSION

The relevant cases and weight of practice among the States indicate that

*Matter of Moore, 453 N.E.2d 971, 973 (1983).

due process requires that an attorney should not suffer disbarment and the consequent loss of so hard-earned a livelihood, as well as injury to reputation, on the basis of facts established by the bare minimum standard of reliability, "preponderance of the evidence." Petitioner respectfully submits that the instant case presents an excellent opportunity to settle this important question.

Petitioner further contends that the Indiana Supreme Court's refusal to review his factual challenges violated due process for a twofold reason: First, the procedural rule governing such review is in itself fatally vague; second, the court, in its prior order regarding the rule, interpreted it in a way which not only appeared to resolve the internal

conflict, but excluded the extreme application of the rule that the court exacted at the last minute. Such procedural injustices cannot be allowed to affect the fundamental interests at stake in this case. Petitioner submits that this aspect of his case deserves consideration by this Court as a confirmation of the concept that, in matters affecting such important interests, the State may not place the risk of procedural vagueries upon the individual citizen.

Respectfully submitted,

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